STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of General Sessions
Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-002483

THE STATE,

Respondent,

v.

BRANDON JERMAINE BENSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly denied Appellant's *Batson* motion where he failed to carry his burden of showing the State's race-neutral explanation for striking the only African-American juror was mere pretext to engage in purposeful racial discrimination.

STATEMENT OF THE CASE

A Pickens County Grand Jury indicted Appellant for first-degree criminal sexual conduct. (R.* Indictment.) On November 16–18, 2015, Appellant proceeded to a trial before the Honorable Perry H. Gravely and a jury. John DeJong, Esquire, represented Appellant, and Assistant Solicitor Shannon Odom, Esquire, represented the State. The jury found Appellant guilty, and Judge Gravely sentenced him to twelve years' imprisonment. (Tr. 622, 627).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant was charged with first-degree criminal sexual conduct in the rape of Victim and proceeded to trial.[1] After the jury was selected, the State made a motion pursuant to *Batson v. Kentucky*[2] and its progeny on the grounds of gender discrimination in regard to Appellant's strike of eight female jurors and one female alternate. (Tr. 49, lines 5–17). Defense counsel gave gender-neutral explanations for each strike, and the trial court denied the challenges. (Tr. 50, line 1–Tr. 56, line 23). Appellant then made a *Batson* motion in relation to the State's strike of the only African-American juror on the panel. (Tr. 56, line 24–Tr. 57, line 11). The solicitor countered Appellant's prima facie showing by explaining that the juror had twenty-eight counts of financial transaction card fraud, another fraud charge, and a petit larceny charge on her criminal history. The solicitor noted that she also struck two other jurors due to their having a criminal history. (Tr. 57, line 13–58, line 7). The solicitor clearly stated, "It has nothing to do with her race." (Tr. 58, line 7–8). The trial court remarked that the juror had a very common name and that he wanted to be sure they had the right person. (Tr. 58, lines 9–13). The clerk and the solicitor checked the date of birth for the criminal record on NCIC and verified it matched the juror. (Tr. 59, line 7–Tr. 60, line 5). At the same time, defense counsel brought up whether the juror would have been qualified to begin with depending on what the maximum

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[1] Appellant seems to take the opportunity to use his Statement of Facts simply to impugn the character of the rape victim, a not uncommon trial tactic utilized by the defense bar in sexual assault cases and one likely to increase in frequency following our Supreme Court's recent derogation of Legislative efforts to reverse South Carolina's shameful history of victim blaming in the courtroom. *See State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (holding instructing the jury that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct was an impermissible charge on the facts and, therefore, unconstitutional). For purposes of the issue on appeal, the only relevant facts pertain to what happened during Appellant's *Batson* motion and the State will limit its recitation of the facts to those germane to the issue at hand.

[2] 476 U.S. 79 (1986).

penalty was for the charges. (Tr. 58, lines 20–22). Once the solicitor obatined the entire criminal history, she told the court it did not show a disposition for the twenty-eight counts of financial transaction card fraud but that the information provided that the charges were for "less than five hundred ($500) in a six-month period." (Tr. 60, line 6–10). In response, the trial judge stated, "So that—yeah, that would be under the—if she were convicted." (Tr. 60, lines 11–13). The trial judge then asked the defendant if there was anything else, to which he responded, "No, Your Honor." (Tr. 60, lines 15–17). The trial judge then denied the defense's *Batson* challenge, stating: "I believe that that is definitely a non-race reason for the strikes." (Tr. 60, lines 18–24).

Ultimately, after the presentation of testimony and other evidence at trial, the jury found Appellant guilty and the trial court sentenced him to twelve years' imprisonment. (Tr. 622, 627).

ARGUMENT

The trial court properly denied Appellant's *Batson* motion where he failed to carry his burden of showing the State's race-neutral explanation for striking the only African-American juror was mere pretext to engage in purposeful racial discrimination.

Appellant argues, inexplicably, that the trial judge erred in denying his *Batson* motion where the State struck the only African-American juror, claiming the reason "was clearly pretextual in light of the State's own *Batson* motion challenging everyone [sic] of Appellant's strikes of white female jurors." (App.Br.9). On the contrary, the State's reason for striking Juror #153 was, as stated, because of her criminal history, which was the same reason the State struck two white jurors. Therefore, the trial court correctly found the reason to be race neutral, and this Court should affirm.

In addition to Appellant's central argument regarding the State's *Batson* motion, he also argues that "the trial court speculated that 'if she were convicted' then the State had provided an adequate race neutral reason for striking her." (App.Br.10). Presumably, he believes this means that the trial court concluded the State had not provided an adequate race-neutral reason for the strike because she had not been convicted. However, a careful reading of the record shows the trial court's comment "if she were convicted" actually referred to an earlier discussion defense counsel brought up about whether the maximum penalty for the charges would have disqualified Juror #153 from jury service altogether.[3] (Tr. 58, lines 19–22; Tr. 60, lines 2–16). When the solicitor told the court that the criminal history information she received regarding Juror #153 said "less than five hundred ($500) in a six-month period," the trial judge said, "Okay. So that—yeah, that would be under the—if she were convicted." (Tr. 60, lines 2–16). It is clear from the

[3] "[N]o person is qualified to serve as a juror in any court in this State if: (1) he has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty." S.C. Code § 14-7-810 (2017).

context of the discussion begun by defense counsel that the judge was talking about statutory disqualification and the penalty for "less than five hundred ($500) in a six-month period" being under one year, so that Juror #153 would not have been disqualified even "if she were convicted." In no way did the comment refer to what Appellant claims is the trial court's speculation that "if she were convicted" *then* the State had provided an adequate race-neutral reason for striking her. Indeed, the propriety of disqualification from jury service and the use of peremptory strikes are separate and distinct issues. Thus, Appellant's tangential focus on the trial judge's comment is of no moment.

Preservation

As to Appellant's core *Batson* claim, initially the State submits the arguments Appellant makes on appeal for why the State's reason for striking the only African-American juror was mere pretext and actually demonstrated purposeful discrimination are not preserved. At trial, Appellant based his *Batson* motion on the simple fact that the State struck the only African-American juror. However, when given a race-neutral explanation, he declined to go further and explain to the trial court why this was pretextual or point to direct evidence of purposeful discrimination. He did not argue that pretext was shown in light of the State's *Batson* motion (as he does in his Issue Statement), nor did he argue that the fact that the solicitor did not know the disposition of Juror #153's charges somehow showed the reason was pretextual. Additionally, he did not argue to the trial court that the State did not mention whether its other strikes were related to criminal history, likely because the State DID do that at trial. Therefore, none of the arguments now raised on appeal were raised to or ruled upon by the trial court and thus are not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693

(2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Inman*, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014); *State v. Palmer*, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016). A court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.* Thus, on review, this Court is limited to determining whether the trial court abused its discretion. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *Palmer* at 511, 783 S.E.2d at 827.

***Batson* Framework**

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a juror on the basis of race. *Batson v. Kentucky,* 476 U.S. 79, 89 (1986); *State v. Inman,* 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014); *State v. Cochran*, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). "Once a peremptory challenge is opposed, the trial court must, upon request, conduct a *Batson* hearing and adhere to the procedures set forth in *Purkett v. Elem,* 514 U.S. 765, 767 (1995), and adopted by our Supreme Court in *State v. Adams,* 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996)." *Cochran*, 369 S.C. at 314, 631 S.E.2d at 297–98. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner that violated the Equal Protection Clause. *Inman* at 26, 760 S.E.2d at 108; *see Purkett,* 514 U.S. at 767–68. (1995).

First, the party making the *Batson* motion must make a prima facie showing that the strike was based on race. *Inman* at 26, 760 S.E.2d at 108. If a sufficient showing is made, the trial court will then move to the next step, which requires the challenging party to provide a race-neutral explanation for the strike. *Id.* If the trial court is satisfied that this burden has been met, it will proceed to the third step, where the trial court has to determine whether the challenging party has proved purposeful discrimination. *Id.* "The ultimate burden always rests with the [party asserting the *Batson* challenge] to prove purposeful discrimination." *Id.*

"Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible." *Purkett*, 514 U.S. at 768; *Inman* at 26, 760 S.E.2d at 108. "'The explanation must only be 'clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it.'" *Inman* at 26, 760 S.E.2d at 108. "In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has <u>proven</u> racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent." *Id.* (emphasis added); *see also Batson*, 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). "During step three, the party asserting the *Batson* challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." *Inman* at 26, 760 S.E.2d at 108–09. "When the opponent of the strike proves the proponent of the strike practiced purposeful racial

discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298.

Discussion / Analysis

Here, in compliance with *Purkett*, the trial court conducted a *Batson* hearing and adhered to the mandatory procedure for evaluating whether the State executed its peremptory challenges in a manner that violated the Equal Protection Clause, with the exception of step three, which Appellant did not assert. After Appellant made a prima facie showing that the challenge was based on race, the trial judge asked the solicitor to provide a race-neutral explanation for the strike, and the solicitor did so. The solicitor explained that Juror #153 was struck because she had "twenty-eight counts of financial transaction card fraud; another fraud charge; and petit larceny on her criminal history." (Tr. 57, lines 15–18). After giving this explanation to the trial judge, the solicitor further explained, "If Your Honor will notice, the other two jurors I struck also had . . . . That's why I struck [the] other. I struck other ones for history. So it's a criminal history thing. It has nothing to do with her race." (Tr. 57, lines 22–23; Tr. 58, lines 5–8). There is no dispute the "other two jurors" were white.

Appellant had no response to the State's explanation and only seemed concerned that if the maximum penalty for Juror #153's charges was more than a year's imprisonment, she would not have been qualified to serve on a jury in the first place. The trial judge and the solicitor seemed rightfully concerned that they make sure the juror in question was in fact the person with that particular criminal history. (Tr. 58, lines 9–22). After checking to ensure the identity of the juror and verify her criminal history, defense counsel seemed satisfied she was the right person and that the charges did not outright disqualify her from service; however, he made no other argument or challenge to her serving on the jury. (Tr. 59, line 17–Tr. 60, line 17). In other

words, Appellant made no "step three" argument "point[ing] to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." *Inman* at 26, 760 S.E.2d at 108–09. Perhaps he chose not to because the State had already articulated that it had struck two white jurors for the same reason. Appellant effectively waived step three of the *Batson* procedure by not even trying to demonstrate pretext in the State's race-neutral reason.

On appeal, Appellant makes two different arguments for why the trial court erred in denying his *Batson* motion. As noted above, these arguments are not preserved because they were not raised to and ruled upon by the trial court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). However, even if this Court somehow finds they are preserved, both arguments are without merit and should be dismissed. First, Appellant attempts to argue that the State's reason for striking Juror #153 was "clearly pretextual in light of the State's own *Batson* motion challenging everyone [sic] of Appellant's strikes of white female jurors." (App.Br. 9). Second, he focuses on the fact that the solicitor did not know the disposition of the juror's charges and considers that fact critical, even though that does not affect whether she had a criminal history and the validity of the strike. (App.Br. 10, 11). He seems to misunderstand the trial judge's comments, noted above, about "if she were convicted" and actually asserts in his brief that the court's denial of the *Batson* motion was based on the "assumption" that "if she were convicted" then the State had provided an adequate race-neutral reason for the strike. This argument is fundamentally flawed. The trial court did not say that the only way the State's reason would be seen as race neutral was if Juror #153 had been convicted, as Appellant implies in his brief. Indeed, the denial of the *Batson* motion belies his argument.

Furthermore, as to his claims that the State did not mention whether any of its other strikes were exercised because of a juror's criminal record and that the State did not identify another juror it struck because of his or her criminal record, these are misrepresentations of the record. As noted above, the solicitor clearly stated, "If Your Honor will notice, the other two jurors I struck also had . . . . That's why I struck [the] other. I struck other ones for history. So it's a criminal history thing. It has nothing to do with her race." (Tr. 57, lines 22–23; Tr. 58, lines 5–8). On its face, the explanation was race-neutral. The State provided a valid, race-neutral reason for striking the juror and thereby met its minimal burden at the second step in the process. *Purkett*, 514 U.S. at 768. The trial judge properly concluded the solicitor had given a race-neutral reason for her strike. At that point, the burden returned to Appellant to show something more to prove purposeful discrimination. *See Inman* at 26, 760 S.E.2d at 108. Although the trial court asked Appellant if there was anything else after confirming Juror #153's criminal record, he said, "No, Your Honor." By failing to offer any further showing in regard to Juror #153, he failed to carry his burden of proof in the trial court.

For these reasons, the trial court's denial of Appellant's *Batson* motion should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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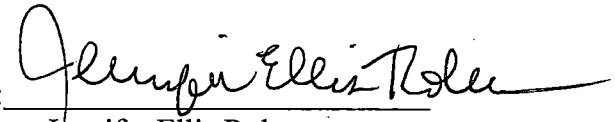
BY: 
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February 21, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of General Sessions
Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2015-002483

THE STATE,

Respondent,

v.

BRANDON JERMAINE BENSON,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 21st day of February, 2017.

ANGELA BENNETT
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ALAN WILSON
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February 21, 2017

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RE: State v. Brandon Jermaine Benson
Appellate Case No. 2015-002483

Dear Mr. Strom,

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
Victim Services